Washington Law Review

Volume 63 | Number 4

10-1-1988

The Public Trust Doctrine: Accommodating the Public Need Within Constitutional Bounds—Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), cert. denied, 108 S. Ct. 1996 (1988)

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THE PUBLIC TRUST DOCTRINE: ACCOMMODATING THE PUBLIC NEED WITHIN CONSTITUTIONAL BOUNDS—*Orion Corp. v. State*, 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied*, 108 S. Ct. 1996 (1988).

By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea.[1]

Traditional common law notions of property resist recognition of a diffuse public right in privately held lands. The public trust doctrine, an historical exception to this general rule, allows states to reserve a public right to lands underlying their navigable and tidal bodies of water. The doctrine originally preserved the public use of navigable waters for commerce and fishing. More recently, however, courts aim the doctrine at the public uses of recreation, ecological study, and aesthetic enjoyment. As the interests protected by the doctrine expand, one thing remains constant: the doctrine's relation to water.

Citizens are increasingly using the public trust doctrine as an effective legal tool for vindicating the public's preexisting rights in privately held lands.[2] The doctrine's recent popularity represents an overdue recognition of the public's right to protect and enjoy natural resources that by their character should be accessible and open to the public.

Despite the public trust doctrine's merits, two significant factors restrain extension of the doctrine beyond its traditional reach:[3] history and the constitution.[4] The doctrine's history shows its traditional

1. J. INST. 2.1.1.

2. *See generally* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (discussing the increasing use of the public trust doctrine as a tool of judicial intervention by private citizens to protect the public interest in environmental quality).

3. For purposes of this article, the physical confines of the public trust will be referred to as the "reach" of the doctrine. The range of public interests protected by the public trust doctrine will be referred to as the "scope" of the doctrine.

4. The United States Constitution protects persons from deprivation of property without due process of law. *See* U.S. CONST. amend. XIV, § 1. It also guarantees that property will not be taken for a public purpose without payment of just compensation. *See* U.S. CONST. amend. V. Expansion of the reach of the public trust doctrine might encroach upon private property interests and trigger these protections. For example, if the public trust is characterized as a public easement, expanding its historical reach onto private property might constitute a taking. *See* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3150 (1987); *see infra* note 99 and accompanying text. Expansion of the public trust doctrine, however, might also be characterized as a land-use regulation. In this area, the *Orion* court recognized that conceptually both due process analysis and takings analysis apply. Orion Corp. v. State, 109 Wash. 2d 621, 648–49, 747 P.2d 1062, 1076–77 (1987), *cert. denied*, 108 S. Ct. 1996 (1988). In Washington, excessive

relationship to certain bodies of water, lending continuity and predictability to the doctrine's reach. This continuity fulfills constitutional property protections' guarantees of certainty and uniformity.[5] Expansion of the doctrine's historical reach—to lands unrelated to water, for example—could undermine its certainty and uniformity, overreaching these constitutional limits.

Constitutional and historical restraints may allow for expansion of the public trust doctrine in a different direction, however. Regulation of activities outside the public trust's reach that cause harmful spillover effects on public trust lands may fit within constitutional strictures. This extension could vindicate preexisting public rights while retaining harmony with the doctrine's historical limits and constitutional property protections.

Following decades of neglecting its public trust duties,[6] Washington now accepts the public trust doctrine as a permanent fixture in its law. In *Orion Corp. v. State,*[7] the Washington Supreme Court reaffirmed the state's sovereign interest as the public's trustee[8] in its tidelands,[9] marshes, and shorelands.[10] The court declared that private use of protected trust lands must conform to the public's interest in navigation, fishing, and recreation,[11] and must not be harmful to the land's dependent wildlife.[12] The court, however, declined to define the public

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regulation may constitute a taking if it goes beyond preventing a public harm and actually confers a public benefit. *Id.* at 651, 747 P.2d at 1078; *see also infra* note 85. Under federal takings analysis, a taking hinges on whether denial of use of the property results in a sufficiently significant economic deprivation to the property owner. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2386–88 (1987).

5. Constitutional due process guarantees protect the reasonable expectations of property owners regarding the economic use of their property. Hodel v. Irving, 107 S. Ct. 2076, 2082 (1987); Agins v. City of Tiburon, 447 U.S. 225, 260 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). Regulations that deprive owners of economically viable uses of their property may violate due process and constitute a taking, requiring just compensation.

6. *See* Allison, *The Public Trust Doctrine in Washington,* 10 U. PUGET SOUND L. REV. 633 (1987); *see also infra* notes 42–50 and accompanying text.

7. 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied,* 108 S. Ct. 1996 (1988).

8. *Id.* at 638–40, 747 P.2d at 1071–73.

9. Lands over which the tide ebbs and flows generally fall within the reach of the public trust doctrine.

10. At common law, the proprietors of lands adjoining fresh water lakes or ponds, which are public, hold to the ordinary low-water mark. J. GOULD, A TREATISE ON THE LAW OF WATERS, 106 (3d ed. 1900). Owners of lands adjoining a navigable river have no private right of property in the waters of the river, or in its shores below high water mark. *Id.* at 303. In Washington, the relative rights of the public and private property owners in navigable lakes and streams fluctuate with the natural fluctuations of the water level. Wilbour v. Gallagher, 77 Wash. 2d 306, 314–15, 462 P.2d 232, 238 (1969), *cert. denied,* 400 U.S. 878 (1970).

11. *Orion,* 109 Wash. 2d at 641, 747 P.2d at 1073.

12. *Id.* at 641, 747 P.2d at 1073.

trust's reach, stating only that it is coextensive with the public need.[13] This standard suggests a willingness to further extend the public trust beyond its water-based context. Such an extension could encounter constitutional obstacles.

I. THE PUBLIC TRUST: AN ANCIENT RIGHT REVITALIZED

A. Historical Development of the Public Trust Doctrine

The public trust doctrine was first expressed in the works of Justinian.[14] According to Roman legal principles, the law of nature provides for communal rights in the most basic of natural resources, including water.[15] The public right of fishing and navigation[16] extends to rivers, their banks,[17] the seashore, and the sea itself.[18] Roman law recognized private ownership in the banks of rivers despite the public's right of use,[19] but the seashore belonged to no one.[20]

The thirteenth century writings of Bracton, the renowned English jurist and student of Roman civil law, introduced the public trust doctrine to the English common law.[21] According to Bracton, the shore, that ground between the ordinary high-water and low-water marks, belonged to the crown.[22] The crown's ownership extended to both the shore of the sea and the shore of the arms of the sea.[23]

The Magna Charta reasserted the public interest in navigation of the realm's navigable streams.[24] The Magna Charta and subsequent stat-

13. *Id.* at 640, 747 P.2d at 1073.
14. J. INST. 2.1.1–2.1.6.
15. *Id.* 2.1.1.
16. *Id.* 2.1.2.
17. *Id.* 2.1.4.
18. *Id.* 2.1.5.
19. *Id.* 2.1.4.
20. *Id.* 2.1.5..
21. S. MOORE, A HISTORY OF THE FORESHORE 31 (1888).
22. *Id.* at 31–33; *see also* J. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND IN THE SOILS AND SHORES THEREOF 17–18 (1826). Common law policy assigned everything capable of occupancy a legal proprietor. Things which by nature could not be exclusively occupied and enjoyed were the property of the sovereign. In England, the king was regarded as the universal occupant, and all property was originally in the crown. The crown, therefore, enjoyed sovereign dominion over the sea adjoining the coasts and over the "arms of the seas," and a vested right of property in the underlying soil. LORD HALE, SIR MATTHEW HALE'S FIRST TREATISE 361 (1786), *reprinted in* S. MOORE, *supra* note 21, at 318. According to Hale, wherever the tide flows constitutes an arm of the sea.
23. LORD HALE, *supra* note 22, at 318.
24. *Id.* at 28. When the Magna Charta was issued in 1215, nearly the entire coastline of England had been granted away by the king. *See also* S. MOORE, *supra* note 21, at 31. Bracton omitted that section of Justinian's Institutes that proscribed private property in the shores. This

utes forbade the use of privately erected fishing structures which impeded the passage of vessels.[25] These statutes, however, did not deny landowners' proprietary interests in their shoreland. The statutes required only that such interests, whether obtained by grant or by prescription, did not prejudice the public's right to use public rivers or arms of the sea.[26] This public right, or *jus publicum*, resembled a public easement in the shores and arms of the sea.[27]

B. Acceptance and Development of the Doctrine in the United States

The United States Supreme Court ensconced the public trust doctrine in American jurisprudence in *Martin v. Waddell*.[28] *Martin* validated the existence of the public trust doctrine in America, and defined its reach. According to the Court, the states as sovereigns inherit the same rights in the lands underlying their navigable waters as those previously held by the crown.[29] This preexisting public right

omission reflects Bracton's recognition that, throughout the kingdom, the foreshore was in many places held as property by private hands, although subject to the public right of use for fishing and navigation. *Id.*

25. *See* LORD HALE, DE JURE MARIS 374, 388–89 (1786), *reprinted in* S. MOORE, *supra* note 21 (citing several of the particular statutes).

26. *Id.* at 389. According to Hale's treatise and other seventeenth century authorities, the crown's interest in the navigable waters was twofold. First, the *jus publicum* represented the crown's sovereign interest as trustee for the public to exercise dominion and control over the navigable waters and their underlying beds for the public benefit. Second, the *jus privatum* represented the crown's proprietary interest, which was always subject to the paramount *jus publicum*, even when conveyed to private hands. *See also* J. GOULD, *supra* note 10, at 59 (under common law, the public had no legal right to bathe in the sea).

27. *See* Comment, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970). The easement approach is theoretically inconsistent with the Roman model of public trust which eschewed private ownership in favor of communal ownership of public trust lands. *Id.* at 769. The easement approach probably represents a compromise in the common law between the public interest of navigation and fishing, and proprietary interests in shorelands that had passed into private ownership.

28. 41 U.S. 367 (1842). In *Martin*, the Court held that public trust powers over lands underlying the navigable waters of a state are vested in the state, not the proprietary owner.

29. *Id.* at 416. British settlers brought the public trust doctrine to the New World when England claimed America by the right of discovery. The colonies' public trust lands thereafter became subject to all the rights and prerogatives of the crown. *See* Shively v. Bowlby, 152 U.S. 1, 14 (1894). When the Revolution took place, those rights and prerogatives passed to the citizens of the states by the right of conquest. *See Martin*, 41 U.S. at 410. Thus, they inherited the absolute right to their navigable waters and the lands under them for their common use, subject only to the rights surrendered to the general government under the Constitution. *See id.* States that subsequently entered the Union acquired ownership of their navigable waters and underlying lands on an equal footing with the original states. *See* Pollard v. Hagan, 44 U.S. 212, 223 (1845).

grew in significance as states sought to vindicate the public's right in privately held public trust lands.[30]

In *Illinois Central Railroad Co. v. Illinois*,[31] the Court reemphasized the state's standing as heir to preexisting rights to the beds of its navigable waters.[32] The Court observed that to account for the unique topographical features of the American continent, and to protect rights of navigation, prior cases had extended the reach of the public trust doctrine to navigable fresh waters and the lands beneath them.[33] The Court explained this extension by finding that the traditional standard of the doctrine's reach, tidal influence, was synonymous with navigability.[34]

Despite the tremendous influence of *Illinois Central*, a later Supreme Court decision[35] indicated that *Illinois Central* rested on state law. Its delineation of the public trust doctrine's reach did not establish national precedent. The Supreme Court continues to recognize the public trust doctrine as a prerogative of state government, declining an active role in vindicating public trust rights.[36] This approach leaves the standard defining the doctrine's reach unresolved.

30. In *Martin*, the Court declined to defer to state court judgments because the property interests in question were created by charters of the British crown, not by the state. 41 U.S. at 417.

31. 146 U.S. 387 (1892).

32. *Id.* at 457–59. The Court observed that the ownership and sovereignty over lands covered by tide waters remain with the states in which the lands are found.

33. *Id.* at 436. The Court observed that the English standard of navigability—where the tide ebbs and flows—is incompatible with the topographical features of the American continent. America, where navigation and commerce were frequently conducted on inland lakes and rivers, needed a broader standard of "navigability in fact." *See* Barney v. Keokuk, 94 U.S. 324, 337–38 (1876); The Propellor Genesee Chief v. Fitzhugh, 53 U.S. 443, 456 (1851).

34. *Illinois Central*, 146 U.S. at 436. The expansion of the public trust doctrine to navigable fresh water rivers and lakes accompanied an expansion of the national admiralty jurisdiction over the same waters. The Court's implication, that the reach of the public trust doctrine would be parallel to the reach of the national government's admiralty jurisdiction, followed from navigation being the primary subject of protection and regulation in both contexts.

35. Appleby v. City of New York, 271 U.S. 364, 395 (1926). In *Appleby*, the Court reversed the ruling of the New York State Court of Appeals and held that under New York law the state legislature could grant land underlying navigable tidal waters free of the *jus publicum*. According to the Court, if the state wished to reassert its sovereign interest in the land, it would have to pay for it. *Id.* at 402–03. The Court had recognized the preeminence of state law in the public trust context in earlier cases. *See, e.g.*, Shively v. Bowlby, 152 U.S. 1, 26 (1894) (no uniform law concerning the circumstances under which a state can abdicate its sovereign and proprietary interests in its public trust lands); Hardin v. Jordan, 140 U.S. 371, 382 (1891) (earlier decisions defining the reach of the public trust doctrine were not universal statements of the law).

36. *See, e.g.*, Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987) (finding no preexisting public right of access to the ocean across private beach because the lower court did not rest its decision on the public trust doctrine, although precedent relied on by the lower court was replete with public trust language); *see also infra* notes 97–105 and accompanying text.

Recently, in *Phillips Petroleum Co. v. Mississippi*[37] the Supreme Court again declined to adopt a uniform standard defining the public trust doctrine's reach and scope. Instead, it reaffirmed the states' authority to define the limits of the lands held in public trust.[38] The Court upheld Mississippi law extending state sovereignty to land underlying nonnavigable waters influenced by the tide.[39] Justice White, writing for the majority, acknowledged the doctrine's traditional relation to navigability, but nevertheless acknowledged the state's interests in lands beneath nonnavigable tidal waters.[40] He concluded that navigable and nonnavigable tidal waters are alike in kind, sharing the same geographical, chemical and environmental qualities.[41]

C. *The Doctrine's Development in Washington*

In view of Washington's extensive coastline,[42] one might assume that the public trust doctrine had an important role in developing state policies. The state constitution gave early recognition to sovereign ownership, asserting a proprietary interest in the lands underlying the state's navigable and tidal waters.[43] The state, however, showed more

37. 108 S. Ct. 791 (1988).

38. *Id.* at 794.

39. *Id.* at 793. Claimants contested title to 42 acres of land lying several miles north of the Mississippi Gulf Coast. Although not navigable, the land was submerged by tidal water. *Id.* at 791.

40. *Id.* at 795. The Court acknowledged that many states rejected the English "tidal influence" standard of navigability in favor of a standard of "navigability in fact." Nonetheless, the Court disavowed the notion that "navigability in fact" had replaced "tidal influence" in defining the possible reach of the doctrine. The Court concluded that the "navigability in fact" standard augmented the "tidal influence" standard rather than qualified it. *Id.* In light of the Court's rationale, its holding should be read as a clarification of an historical ambiguity in the public trust doctrine, not as an expansion of the doctrine's reach.

41. *Id.* at 798–99. The dissent, asserting that navigability, not tidal influence, ought to be acknowledged as the universal hallmark of the public trust, drew a distinction between tidelands that are a part of or immediately bordering a navigable body of water and tidelands underlying a discrete and wholly nonnavigable body of water. The former, because of its relation to navigation, would be burdened by the public trust; the latter would not. *Id.* at 802–03 (O'Connor, J., dissenting).

42. The inland shoreline of Puget Sound alone extends more than 2,100 miles. T. ANGELL & K. BALCOMB III, MARINE BIRDS AND MAMMALS OF PUGET SOUND 2 (1982); *see also*, McCormick, *Puget Sound Given National Recognition*, WASH. COASTAL CURRENTS, Apr. 1988, at 1 (Environmental Protection Agency designated Puget Sound an estuary of national significance).

43. WASH. CONST. art. XVII, § 1. This section declares:

> The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state, up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes . . . .

interest in the revenue it could obtain by disposing of its tidelands and shorelands than in protecting a valuable state resource.[44]

Early Washington public trust cases emphasized the state's absolute power to convey public trust lands free of any public right of access or use.[45] They rejected protecting the public's right of access and use of public trust resources that had passed to private ownership. These cases show a narrow construction of the extent of public rights in the state's tidelands and shorelands.[46]

Early cases also failed to clearly define a standard to measure the reach of the public trust doctrine. The state constitution's claim to lands underlying tidal waters and its claim to the beds and shores of all navigable waters were asserted separately.[47] This suggests that the constitution intended tidal influence, in addition to navigability in fact, to define the reach of the state's public trust doctrine. Indeed, an early case[48] held that if the body of water in question was influenced by the tide, then its bed and shores belonged to the state as a matter of state constitutional law.[49] Other cases emphasized navigability in defining the state's public interest in its tidelands and shorelands.[50] Given the express language of the state constitution, however, the historical

44. *See* State v. Sturtevant, 76 Wash. 158, 171, 135 P. 1035, 1040 (1913), where the court observed:

> Those who sat in the constitutional convention, and those who met in our early legislative assemblies, were confronted with an important problem when treating the subject of tide and shore lands. Many insisted that the state should reserve title and that the land should never be sold. Others maintained that the best interests of the state demanded that they pass into private ownership, thus becoming a subject of taxation and revenue to the state. The latter theory prevailed, subject to the qualification that the harbor area should never be disposed of.

45. *See, e.g.*, Eisenbach v. Hatfield, 2 Wash. 236, 244–45, 26 P. 539 (1891). In *Eisenbach,* the court, after a survey of Supreme Court decisions, concluded that title to the state's tidelands belong to the state. The court reasoned that the state had full power to dispose of them, subject to no restrictions except those imposed upon the legislature by the state and federal constitutions. Further, the court found that no individual can have any legal right to claim any easement in, or to impose any servitude upon, the state's tide waters without the consent of the legislature. *Id.* at 541; *see also* Puget Mill Co. v. State, 93 Wash. 128, 135, 160 P. 310, 313 (1916); Palmer v. Peterson, 56 Wash. 74, 76, 105 P. 179, 180 (1909); Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 90, 102 P. 1041, 1044 (1909); Sequim Bay Canning Co. v. Bugge, 49 Wash. 127, 133, 94 P. 922, 924 (1908).

46. The state regarded the national government's authority to regulate commerce and the public's right of navigation as the only limitation on its power to dispose of its tidelands and shorelands. *See, e.g., Sturtevant,* 76 Wash. at 165, 135 P. at 1037 (observation by the court that "[t]he only right which the state has ever undertaken to maintain in trust for the whole people is the right of navigation.").

47. *See supra* note 43.

48. *Grays Harbor Boom Co.,* 54 Wash. at 83, 102 P. at 1041.

49. *Id.* at 91, 102 P. at 1044.

50. *See, e.g., supra* note 46.

reach of the state's public trust interest could extend to all lands influenced by the tide as well as those underlying navigable fresh water rivers and lakes.

D. Orion Corp. v. State

Orion involved a classic regulatory taking dispute between a private landowner and the state. Orion Corporation owned, or had options to buy, nearly eighty percent of the land underlying Padilla Bay.[51] This estuary sustains an immensely diverse and densely populated ecosystem.[52] Orion planned to dredge and fill this land to create a Venetian-style community for 30,000 people.[53] A 1969 court decision, however, cut short Orion's development plans. *Wilbour v. Gallagher*[54] upheld the public's right to travel all navigable waters, even when these waters lie over privately owned lands.[55] In response to *Wilbour*, the Governor immediately imposed a moratorium on all tideland filling projects.[56] The legislature, at the end of this legal chain reaction, enacted the Shoreline Management Act ("SMA") in 1971.[57]

The SMA identified Padilla Bay as one of five shorelines of statewide significance.[58] Subsequent state and local land use regulations foreclosed the use of Orion's land for the intended dredge and fill project.[59] The only remaining possible uses of value were nondisruptive

51. Orion Corp. v. State, 103 Wash. 2d 441, 444, 693 P.2d 1369, 1372 (1985).

52. Over 239 species of birds inhabit the estuary. Many use the bay as a resting and feeding spot on their migratory routes. The bay serves also as a wintering spot for thousands of brant, ducks, and other sea birds, including loons, grebes and gulls. Bald eagles nest on the shore of the bay and feed on the bay's chum salmon during the winter when the salmon runs are low in the upper rivers. The bay is the location of one of the greatest blue heron colonies in Washington. It supports one of the densest wintering populations of peregrine falcons in North America. These falcons, an endangered species, roost in the area and use the entire bay for hunting. The bay is also home to a significant population of harbor seals, and harbor seals from other parts of Puget Sound come to bear their pups there. Perhaps the most ecologically significant feature of Padilla Bay is its abundance of eelgrass. Covering 73 percent of the bay, it is the second largest eelgrass bed on the West Coast. This eelgrass and the microorganisms it supports provide food and cover for several important species, including various species of fish and crabs. The eelgrass meadows serve also as a feeding ground for the bay's huge bird population. The bay is an important spawning site for herring, as well as a significant location for the growth of juvenile salmon. *See* Petitioner's Brief at 8–14, Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied,* 108 S. Ct. 1996 (1988).

53. *Orion,* 103 Wash. 2d at 444, 693 P.2d at 1372.

54. 77 Wash. 2d 306, 462 P.2d 232 (1969), *cert. denied,* 400 U.S. 878 (1970).

55. *Id.* at 315–16, 462 P.2d at 238.

56. *Orion,* 109 Wash. 2d at 627, 747 P.2d at 1066.

57. WASH. REV. CODE ch. 90.58 (1985).

58. WASH. REV. CODE § 90.58.030(2)(e)(ii)(E) (1985).

59. *Orion,* 109 Wash. 2d at 626, 747 P.2d at 1066.

recreation and aquaculture.[60] Recognizing Orion's economic frustration,[61] the state sought to compromise on the "takings" issue, offering to buy Orion's land without threat of subsequent condemnation.[62] Orion rejected the state's offer. Instead it brought suit alleging an inverse condemnation of its property.[63]

The *Orion* court dismissed Orion's contention that it had a vested interest in the use of its tidelands for a dredge and fill project.[64] The court found that state and local governments' preclusion of Orion's dredging and filling of Padilla Bay had placed no greater burden on Orion's land than that which had always existed under the public trust doctrine.[65] This burden precluded any use of the land incompatible with the public trust, even if Orion were denied all economically viable use of its land.[66] Therefore, the state's historical role as trustee to its public trust lands allowed it, without violating federal constitutional limits,[67] to prevent Orion from making any economically viable use of its property.[68]

The *Orion* court did not indicate how far the state's public trust interest extended. It stated, however, that the trust's reach was not limited by its relationship to the waters. Rather, its historical reach merely recognized where the public need lay.[69] Unfortunately, the court's treatment of the public trust issue was cursory,[70] and the court

60. Aquaculture includes the production of food fish, shell fish, and other aquatic plants and animals in fresh or salt water. It often requires development of fish hatcheries, rearing pens and structures, and shellfish rafts, as well as use of natural spawning and rearing areas. *Id.* at 628 n.3, 747 P.2d at 1066 n.3.

61. Orion claimed an appraised value of its land, based on its use as reclaimed farmland which would require dredging and filling, of $1,200 per acre. The state's final offer for the land was $100 per acre. *Id.* at 629–30, 747 P.2d at 1067. Orion's acquisition cost for 5,600 acres of its land in Padilla Bay, acquired between 1963 and 1968, was approximately $36 per acre in nonconstant dollars. Petitioner's Brief at 23–24, Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied,* 108 S. Ct. 1996 (1988).

62. *Orion,* 109 Wash. 2d at 629–30, 747 P.2d at 1067.

63. *Id.*

64. *Id.* at 641, 747 P.2d at 1073.

65. *Id.* at 638–39, 747 P.2d at 1072.

66. *Id.* at 659–60, 747 P.2d at 1082–83.

67. *See supra* note 4.

68. The *Orion* court recognized that deprivation of all legally permissible use of Orion's land would determine whether the burden imposed on Orion's land was a taking. *Orion,* 109 Wash. 2d at 659, 747 P.2d at 1082. The court concluded that Orion's intended dredge and fill project was not a legally permissible use under the public trust doctrine. *Id.* at 659, 747 P.2d at 1082–83. The court went on to determine whether state and county regulation of Orion's land precluded Orion from making an economically viable use of its land compatible with the public trust. *Id.* at 659–62, 747 P.2d at 1082–84.

69. *Id.* at 640, 747 P.2d at 1073.

70. Of the 54 pages that comprised the court's opinion in *Orion,* approximately four pages were devoted to discussion of the public trust doctrine. *Id.* at 638–42, 747 P.2d at 1071–73.

left unanswered fundamental questions regarding the doctrine's reach.[71] The land in *Orion* was unquestionably subject to the state's public trust interest. The court's dictum, however, suggested a willingness to consider future expansion of the doctrine beyond the state's tidelands and shorelands.

II. EXTENDING THE PUBLIC TRUST'S REACH: ACCOMMODATING PUBLIC NEED WITHIN CONSTITUTIONAL LIMITS

The *Orion* court recognized the traditional reach of the public trust with its concomitant concept of a preexisting public right. The court, however, also stated that the public trust's reach is coextensive with the public need. This statement, when read in tandem with the court's reliance on expansive views of the doctrine,[72] invites speculation about the true reach of Washington's public trust doctrine. Because the public trust may encroach on private property interests, constitutional property protections stand as an obstacle to expansion of the doctrine beyond its traditional reach. Such constitutional limits, however, might not prevent the state from regulating the use of non-public trust land which has harmful spillover effects on public trust resources.[73]

In recent decades, the expansion of civilization has placed acute strains on nature's limited store of resources. The resulting competition for dwindling resources[74] caused some commentators and courts to reexamine conventional property theory in light of public necessity. Some have advocated a more comprehensive view of public property which challenges the common law notion of absolute private property rights. The public trust doctrine, with its legally recognized public right component, has become a favored vehicle for asserting public rights in privately owned land. Expansive theories of public property rights, however, must be squared with constitutional protections of private property. Extending the public trust doctrine to private property, without a supporting claim to a preexisting public right, could violate these constitutional limitations. Recent Supreme Court decisions have, in fact, implied that any constitutional broadening of the

71. In fact, the court specifically declined to define the total scope and reach of the doctrine, deferring that opportunity until a later date. *Id.* at 641, 747 P.2d. at 1073.

72. *See, e.g., id.* at 641 n.10, 659, 747 P.2d at 1073 n.10, 1083.

73. *See infra* notes 126–31 and accompanying text.

74. *See, e.g.,* Comment, *California's Tideland Trust: Shoring It Up,* 22 HASTINGS L.J. 759 (1971) (due to intense competition for California's dwindling coastal resources, active state enforcement of the public trust doctrine provides a means of allocating these resources to the public).

public trust doctrine's reach must be consistent with its historical reach as defined by each state.

A. Constitutional Restraints on Expansion of the Public Trust Doctrine

1. Protection of Due Process and Takings Clauses

Federal constitutional protections of private property serve as a low water mark when states apply their own constitutional provisions to property disputes. In *Pruneyard Shopping Center v. Robins,*[75] the United States Supreme Court held that states may interpret rights and protections offered by their constitutions more broadly than those offered by the federal constitution.[76] The Court, however, qualified this authority by declaring that states may not encroach upon private rights and interests guaranteed under the federal constitution.[77] In extending the reach of their public trust interests, therefore, states are bound by federal constitutional protections of private property.

Early expansion of the American frontier lent itself to state latitude in defining the reach of public rights in areas where few, if any, private property interests yet existed.[78] However, private property interests have since extended to the limits of that defined backdrop of public rights, now acting as a deterrent to expansion of the public trust.[79]

Procedural due process requires that laws provide a model of predictability and uniformity on which persons can structure their affairs.[80] The federal constitution explicitly protects property interests

75. 447 U.S. 74 (1980).

76. *Id.* at 81.

77. *Id.* In *Pruneyard,* shopping center owners claimed that the first amendment rights of a group of students to solicit signatures for a petition on the shopping center's property violated their constitutionally protected property right to exclude them. *Id.* at 82.

78. *See* G. GOGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 43–118 (1981) (discussion of the history of public land law and early expansion of the American frontier).

79. *See* Peralta v. United States, 70 U.S. 434, 438 (1865), where Justice Davis, discussing the mid-nineteenth century colonization of the Western United States, observed:

> The country was new, and rich in mineral wealth, and attracted settlers, whose industry and enterprise produced an unparalleled state of prosperity. The enhanced value given to the whole surface of the country by the discovery of gold, made it necessary to ascertain and settle all private land claims, so that the real estate belonging to individuals could be separated from the public domain.

80. *See, e.g.,* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980) (due process protects persons from being unexpectedly haled into court in a state where they have no contacts or connections); *see also supra* note 5.

with the guarantee of due process.[81] In addition, the takings clause of the fifth amendment protects persons from uncompensated deprivation of their property when taken for a public purpose.[82] Excessive regulation of property may also constitute a compensable taking when it denies owners the beneficial use of their property.[83] The underlying principle of these constitutional protections of property is that government may not force a few people to bear public burdens which, in fairness, should be borne by the public at large.[84]

In *Orion,* the court was not restrained by constitutional limits in denying Orion the intended use of its land. The *Orion* court viewed the state's public trust restrictions on Orion's land as a preexisting public right, not as a garden variety land-use regulation. The court recognized the constitutional limitations on state property regulation.[85] According to the court, however, precluding a use of public trust land incompatible with the public trust was not a taking because the right to make such a use never existed.[86] The state's public trust interest in Orion's land preceded and qualified Orion's proprietary interest.[87] The state was capable of denying Orion all beneficial use of its property by recognizing existing rights in Orion's property.[88] The public's preexisting right was indispensable to the state's ability to protect the public trust interest without unconstitutionally interfering with Orion's property rights.

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81. U.S. CONST. amend. V, XIV § 1 states: "No person shall . . . be deprived of life, liberty, or property, without due process of law." *See also supra* note 4. The fourteenth amendment extends application of this guarantee to the states.

82. U.S. CONST. amend. V states: "[P]rivate property [shall not] be taken for public use, without just compensation." *See also supra* note 4. This guarantee also applies to the states through the fourteenth amendment.

83. *See supra* note 5.

84. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2388 (1987).

85. Orion Corp. v. State, 109 Wash. 2d 621, 655–56, 747 P.2d 1062, 1080–81 (1987), *cert. denied,* 108 S. Ct. 1996 (1988). The court held that regulatory schemes merely imposing land use restrictions to safeguard the public interest in health, the environment, and the fiscal integrity of the area, are insulated from characterization as compensable takings. According to the court, the constitutionality of these regulations is to be decided as a matter of due process, according to standards of reasonableness. A regulation will be invalidated if it is found that it goes beyond preventing a public harm to confer a public benefit. Where a regulation is not insulated, the *Orion* court held that a taking can occur if (1) the regulation does not substantially advance a legitimate state interest, and (2) the property owner is deprived of all economically viable use of the property. In such cases, complainants are entitled to just compensation if a taking occurred. In both situations, the court looks to the deprivation of economic interests and expectations of the property owner in assessing the constitutionality of the regulation. *Id.* at 648–49, 655–56, 747 P.2d at 1076–77, 1081.

86. *Id.* at 641, 659–60, 747 P.2d at 1073, 1082–83.

87. *Id.* at 638, 747 P.2d at 1072.

88. *Id.* at 659–60, 747 P.2d at 1082–83.

Phillips Petroleum Co. v. Mississippi,[89] a recent Supreme Court decision, supports the *Orion* takings analysis, insofar as it recognized that there are no constitutional limitations on the states' enforcing their preexisting public trust rights. The *Phillips* majority disagreed with the dissent's criticism that adoption of a tidal influence standard would extend the traditional reach of the public trust, upsetting private property interests.[90] Rather, the majority concluded that Mississippi law had consistently held that the public trust included all land under tidewater.[91] By focusing on the historical reach of the state's public trust doctrine, the Court affirmed its concern that the doctrine provide a uniform and consistent model[92] upon which private property interests can be established.[93] The Court's emphasis on a historical claim to the state's asserted interests implicitly rejected the notion that states are free to expand the reach of their public trust interest beyond its traditional reach.

The historical location of borders separating distinct property interests may determine the reach of constitutional protections of private property. The *Phillips* Court characterized the controversy before it as a "quiet title suit."[94] The plaintiffs brought the action to settle conflicting claims to the same property.[95] The Court used history and state precedent to define the boundaries that separate the state public trust interest from the claimed private property interest.[96] This definition could establish the reach of constitutional protections of the private claimant's property interests as well. Expansion of one interest may encroach upon the other, with due process and the takings clause serving as a check to deprivation of settled property interests.

89. 108 S. Ct. 791 (1988); *see also supra* note 37 and accompanying text.

90. *See* 108 S. Ct. at 804 (O'Connor, J., dissenting).

91. *Id.* at 798. The Court acknowledged that this was the first case decided by the state's supreme court that involved a question of the public trust interest in nonnavigable tidelands, but concluded that "clear and unequivocal" statements in the court's earlier opinions gave ample indication of the state's claim to its tidelands. The Court concluded that many land titles had been adjudicated based on the tidal influence standard for tidelands, and that rather than upsetting reasonable property-related expectations, the standard adopted by the Court reaffirmed them. *Id.*

92. *See id.* (emphasizing the uniformity, certainty, and ease of application of the "ebb and flow" rule for defining the reach of the public trust).

93. *Id.* (expressly recognizing importance of honoring reasonable expectations in private property interests).

94. *Id.* at 793.

95. *Id.*

96. *Id.* at 798.

2. *The Supreme Court's Narrow Construction of Public Rights in Private Property*

In addition to implying constitutional property protections as a limit to the public trust's reach, the Supreme Court has shown that it may disregard the claim of a public right altogether. In *Nollan v. California Coastal Commission*[97] the Court held that, under the particular facts of the case, constitutional property protections outweighed public interests in the same property.[98]

In *Nollan,* the state coastal commission attempted to exact a public easement across a private beach as a condition to permitting the owners to develop their upland property. The Court held that the state's action constituted a compensable taking.[99] In a strong dissent, Justice Brennan asserted that this was a case of property owners encroaching on the public's right of access to the ocean, not the right of the public encroaching on the right of property owners to develop their property.[100] The majority declined to strike such a balance, and instead found that no public right existed.[101]

Finding no preexisting public right to the property, the Court analyzed the state's denial of the development permit to determine whether such action was a compensable taking.[102] The Court concluded that the state's granting a permanent and continuous right to the public to traverse a privately owned beach did constitute such a taking.[103] In reaching this conclusion, the Court virtually ignored

97. 107 S. Ct. 3141 (1987); *see also supra* note 36.

98. 107 S. Ct. at 3150. Because the Supreme Court has not developed a bona fide takings test, Keystone Bituminous Coal Ass'n v. DeBenedictus, 107 S. Ct. 1232, 1247 (1987), *Nollan* may be limited to its facts.

99. *Nollan,* 107 S. Ct. at 3150.

100. *Id.* at 3154 (Brennan, J., dissenting). Justice Brennan recognized constitutional protections of the reasonable expectations of property owners. He asserted, however, that the property owners in this case had no reasonable claim to any expectation of excluding the public from traversing their property to gain access to the ocean. *Id.* at 3154, 3158. Justice Brennan supported his proposition with a state constitutional provision proscribing waterfront property owners from denying public access to any navigable water in the state, when access is required for a public purpose. *Id.* at 3158–59. His dissent also emphasized the primacy of state law in defining property rights, a principle heavily relied upon by the majority in *Phillips.* Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791, 798–99 (1988).

101. *Nollan,* 107 S. Ct. at 3145–46. Instead, the Court found California had adopted the general rule that persons may not trespass on private lands to get to navigable waters. The majority rejected Justice Brenann's assertion that the state's constitution proscribed private landowners' denial of public access to the states navigable waters on which their property fronts. According to the Court, because the lower court did not rest its decision on the constitutional provision, it would be improper for the Court to resolve that question of state constitutional law in the first instance. *Id.* at 3146.

102. *Id.* at 3146–47.

103. *Id.* at 3146.

precedent cited by the state court stating that acquisition of public easements across private beaches was a legitimate exercise of the state's public trust duties.[104] The Court thus evidenced a commitment to stringent protection of private property interests by narrowly construing the state's law regarding the public's right of access to navigable waters.[105]

Given these constitutional constraints, states must work within the strictures of defined property interests in recognizing public rights in limited state resources. Among the rights acquired through private ownership of property, the common law has yet to recognize a right belonging to the public at large outside the context of navigation, nuisance, or the public trust.[106]

B. Expansive Theories of Public Rights in Private Property

Some theorists argue that laissez faire notions underlying much of common law property theory are ill suited for modern circumstances, and advocate a concept of private property that embodies public rights. As Professor Sax[107] observes, contemporary theory is based on the erroneous assumption that property exists in isolation.[108] Sax contends that property is, in reality, part of a network. The uses of one's property often affect others beyond the property's boundaries.[109] Further, American common law irrationally refuses to recognize public rights in property simply because the public holds them cumulatively rather than in a more conventional form of ownership.[110]

Professor Sax advocates a system that would prohibit owners from uses of their property that have a spillover effect on other property.[111]

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104. The state court relied on cases containing strong public trust language. *See, e.g.,* Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578, 584–86 (1985) (the court recognized exactions of public easements across private beaches as a condition to granting development permits as a legitimate exercise of the state's public trust duty to maximize public access to navigable waters).

105. *See also* Kaiser Aetna v. United States, 444 U.S. 164 (1979) (federal government may not open to the public a private marina created by connecting a privately owned lagoon to a navigable bay without compensating the owner).

106. Sax, *Takings, Private Property And Public Rights,* 81 YALE L.J. 149, 155 (1971).

107. Professor of Law, Boalt Hall School of Law, University of California at Berkeley and prominent critic of the common law tradition of property.

108. Sax, *supra* note 106, at 152.

109. *Id.* at 152–53.

110. *Id.* at 155. Professor Sax observes that public rights presently preempt private property rights only sporadically, as in the federal navigation servitude, nuisance, and the public trust doctrine.

111. *Id.* at 161–162. The types of spillover effects Professor Sax contemplates include: (1) use of land which impinges on the uses of other land (e.g., strip mining that causes erosion to the land below); (2) use of a common to which another landowner has an equal right (e.g., dumping

This model would protect resources shared in common[112] against the spillover effects of private property use. For example, wetlands owners would have no greater right to develop their land in derogation of the public's right to use or otherwise enjoy it[113] than they would have the right to dump waste on an abutting landowner's property.[114] Sax's theory, unencumbered by traditional doctrinal limitations and rules,[115] is sufficiently flexible to protect the public need wherever it may lay. Public policy, rather than inflexible legal rules, guides accommodation of competing interests.[116] The political process insulates private property rights from any radical encroachment by public interests.[117]

Despite its theoretical appeal, Sax's proposed model gives too little weight to present day realities of property interests.[118] Professor Sax's model of social property defines private property rights as a matter of public policy, so the status of private property interests is dependent on externalities.[119] Wealth could become wealth in common depend-

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water from industrial use into a stream used for human water supply; other commons might include air, silence, wetlands and visual prospect); and (3) use of property that affects the health and well-being of others, (e.g., treatment of land with harmful chemicals). Sax's proposed model would restrain any use of property having harmful spillover effects, no matter how severe the economic loss of the property owner, without payment of compensation.

112. The common law doctrine of land ownership extending to the periphery of the universe has been revised to recognize a common. According to Sax, the identification of a common should rest on whether a resource is inextricably intertwined with the use of various properties. *See id.* at 164.

113. It might be said, for instance, that the public has a right to have the property preserved in its natural state to preserve its aesthetic value or to protect its dependent wildlife. *See infra* notes 140–41 and accompanying text.

114. *See* Sax, *supra* note 106, at 162 (wetlands cited as an example of a common).

115. *See supra* notes 4, 5 & 85 and accompanying text.

116. Sax, *supra* note 106, at 172.

117. *Id.* at 171. According to Sax:

> [T]he proper decision as to competing property uses which involve spillover effects is that which a rational single owner would make if he were responsible for the entire network of resources affected, and if the distribution of gains and losses among the parcels of his total holding were a matter of indifference to him.

Id. at 172.

118. Rodgers, *Bringing People Back: Toward a Comprehensive Theory of Taking in Natural Resources Law*, 10 ECOLOGY L.Q. 205, 211 (1982). Under present conceptions, property is viewed by many as a virtual biological extension of the person. This theory of private property is perhaps best represented by Locke's labor theory. The theory is based on the premise that the right of property begins with one's own body and extends to all things made useful by one's efforts. *Id.* at 209. In response to problems posed by resource limits, Locke adopted the following proviso: appropriation of land by labor could continue only as long there are resources left in common for others and everyone takes only what they can use. Locke, *An Essay Concerning the True Original Extent and End of Civil Government*, in E. BARKER, SOCIAL CONTRACT §§ 31, 33, 37, 46 (1947) (cited in Rodgers, *supra*, at 210).

119. Rodgers, *supra* note 118, at 229.

ing on the public's perceived need, putting private property in jeopardy through shifts in opinion.[120] Sax's expansive view of public rights in private property could, in effect, create a floating easement. Clouds could be cast on property titles, having a direct and negative impact on their assessed values, in turn affecting local real estate markets and tax bases.[121]

Constitutional property protections proscribe such unexpected redefinition of vested property interests.[122] Distinct from Sax's theory, the public trust doctrine, by confining the public's interest to defined areas, provides the certainty demanded by a system built on private wealth and property.

The expanding scope of state police power regulation represents another alternative for vindicating diffuse public rights in private property. Present law stops short of giving equal weight to public interests and to private interests in private property.[123] Nonetheless, courts usually uphold regulations of private property in the public interests of health, environment, and the locale's fiscal integrity unless the regulations effectively deny private property owners the beneficial use of their property.[124] Again, the determinative factors are how far the regulation goes beyond preventing a public harm toward confer-

120. *Id.* at 229–30. Professor Sax asserts that any redefinition of private property interests will only result if a balance is struck between traditional private property rights and the rights of the diffuse public. The role of the judiciary in scrutinizing that balance would be minor, but the courts could intervene at the extremes when the balance is found to be so misguided as to be beyond the bounds of the police power. Sax, *supra* note 106, at 171. Sax fails to square his analysis with the concern that fundamental individual rights should not be subject to redefinition according to majoritarian views. It is this preoccupation with individual rights as opposed to public rights that seems most bothersome to Sax.

121. *See, e.g.,* Opinion of Justices to Senate, 383 Mass. 927, 424 N.E.2d 1111, 1115 (1981). This concern was addressed by the Massachusetts Legislature in enacting a bill entitled "An Act relative to title to tidelands lying within the city of Boston and bordering on or near the waters of the commonwealth." (House No. 658). *Id.* The Legislature sought to extinguish any vestige of state sovereignty in tidelands lying landward of a designated line. Among the specific legislative findings were the following:

> (6) clouds on title arising from asserted vestigial interests of the Commonwealth in . . . littoral properties might . . . prevent development of the type which has aided in the economic revival of Boston and would stultify growth and further reduce the tax base of the city; (7) the public welfare would be best served by creating certainty of titles and by eliminating 'any unexpressed, implied, imputed, or implicit rights or conditions retained by the commonwealth.'

Id.

122. *See supra* note 5 and accompanying text.

123. Constitutional guarantees of due process that protect private property interests from encroachment of public interests have not been held to protect public interests in private property. *See, e.g., supra* notes 97–105 and accompanying text.

124. *See supra* notes 4, 5 & 85 and accompanying text.

ring a public benefit, and how economically burdensome the regulation is on the property owner.[125]

C. *Judicial Expansion of the Public Trust Doctrine*

1. *Prohibiting Harmful Spillover Activities Outside the Reach of the Public Trust Doctrine*

In the wake of *Orion*, the Washington Supreme Court may face difficult questions about expanding the public trust doctrine. The rigidness of the doctrine's traditional reach, in light of the public's expanding interests in state resources, has given rise to difficult questions in other jurisdictions. Among these is whether harmful spillovers from nonpublic trust property onto public trust lands violates the public trust doctrine. The California Supreme Court recently addressed this question in *National Audobon Society v. Superior Court of Alpine County.*[126]

The court in *National Audobon* extended the public trust doctrine's protection to the nonnavigable tributaries of a navigable lake when diversion of the water of those tributaries had a negative impact on the lake's public trust values.[127] The court directed the state to consider public trust interests when making future land use grants which may impact public trust values.[128]

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125. *See supra* notes 5 & 85 and accompanying text.

126. 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P.2d 709 (1983). In *National Audobon,* the California State Department of Water and Power's ("DWP") diversion of virtually the entire flow of four of the five tributary streams of Mono Lake had caused the level of the lake to drop drastically, seriously threatening the lake's ecosystem and scenic beauty. Mono Lake is, for now, the second largest lake in California and a navigable waterway. *Id.,* 189 Cal. Rptr. at 348, 356, 658 P.2d at 711, 719. Diversion of water from the lake's tributaries began in 1940 and was increased in 1970. By October of 1979, the lake had shrunk from its prediversion level of 85 square miles to 60.3 square miles. Its surface level had dropped 43 feet. *Id.,* 189 Cal. Rptr. at 351, 658 P.2d at 714.

127. *Id.,* 189 Cal. Rptr. at 348, 352–53, 658 P.2d at 711, 715–16. Mono Lake is saline and supports a large brine shrimp population which feeds vast numbers of nesting and migratory birds. The lake's islands protect a large breeding colony of California gulls, and the lake serves as a stopover for thousands of migratory birds. With diversion of the lake's tributaries, and the consequential drop in water level, one of the lake's principal islands has become a peninsula, exposing the gull nests to coyotes and other predators. The drop in the lake's level has also increased the lake's salinity, causing a marked reduction in the brine shrimp population. Nearly ninety-five percent of the state's gull population and twenty-five percent of all species nest at the lake. In 1981, ninety-five percent of the hatched chicks did not survive to maturity. The lake's recession also has adversely affected it scenic value.

128. The court recognized extension of the public trust doctrine to protect a myriad of public interests. *Id.,* 189 Cal. Rptr. at 356, 658 P.2d at 719. Relying on two previous decisions (People *ex. rel.* Roberts v. Russ, 132 Cal. 102, 64 P. 111 (1901); People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 P. 1152 (1884)) the court found that the public trust doctrine extended protection to navigable waters from harm caused by the diversion of nonnavigable tributaries. *National*

National Audobon represents a cautious expansion of the public trust doctrine with potential application beyond the reach of a state's navigable or tidal waters. Applying the court's reasoning, a state might permissibly prohibit any land use[129] having a deleterious impact on public trust interests. Contiguousness of the spillover source to the adversely affected public trust lands need not be a requirement to regulating its use. Under this principle, the public trust would no longer uniquely burden private owners of public trust lands. Rather, the public trust would burden all property owners whose property-related activities have harmful spillover effects on public trust lands.[130]

While the court's decision in *National Audobon* expanded the effects of the public trust beyond navigable waters, it did nothing to expand the reach of the public trust itself. By confining the situs of the public trust right to the state's navigable fresh waters and tidelands, the court did not violate the uniformity and certainty of the public trust's reach. This expansion did not offend constitutional limits.

Regulation of spillover effects on public trust resources vindicates the public's preexisting right to the use and enjoyment of those resources. Such regulation would put landowners and resource users on notice that any rights acquired by them do not include the right to harm public trust interests that, as a matter of state law, preceded their interests. Regulation of harmful activities outside the reach of the public trust could extend to public trust lands the same protection a state's common law authority to prohibit nuisance accords private property.[131] Adoption of the California view in Washington would represent a beneficial extension of the public trust doctrine to regulate upland uses harmful to public trust interests. This view expands the reach of the public trust's protection without violating the model of uniformity and certainty provided by the doctrine's traditional reach.

Audobon, 33 Cal. 3d 419, 189 Cal. Rptr at 357, 658 P.2d at 720. Although the DWP's interests in the waters of the lake's tributaries was termed to be a usufructuary and not an ownership interest, the court's decision could presumably be extended to the latter context as well. *Id.*, 189 Cal. Rptr. at 361, 658 P.2d at 724.

129. Such uses might include upland development, irrigation, spraying of pesticides, or disposal of wastes.

130. *See generally* Johnson, *The Emerging Recognition of a Public Interest in Water: Water Quality Control by the Public Trust Doctrine*, in WATER AND THE AMERICAN WEST 128 (1988) (essay on the public trust doctrine as a means to water quality control).

131. *See generally* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 7.2 (1984) (discussion of the common law doctrine of nuisance).

2. *The Floating Easement Approach: Up Against Constitutional Limits*

The *Orion* court cited with favor *Just v. Marinette County,*[132] a Wisconsin case advocating an expansive view of public rights in private property. *Just* serves as an example of an expansion of public rights that could infringe on the constitutional rights of private property owners. In *Just*, a county ordinance prohibited plaintiffs from placing fill on their wetlands without a special permit.[133] The ordinance sought to preserve the public's rights in the county's navigable waters by protecting the contiguous shorelines from the harmful effects of uncontrolled use and development.[134] The court held that the interrelationship of the wetlands and shorelands with the state's public trust duties made the ordinance a valid exercise of the state's police power.[135]

In defining the reach of the public trust in the state's navigable waters, the court held that lands adjacent to or near navigable waters were subject to the state's public trust powers.[136] Further, the court held that the ordinance did not constitute a compensable taking because it did not confer a public benefit.[137] Rather, it protected an existing public right to preservation of the state's wetlands.[138]

The result in *Just* can be justified by application of the spillover theory adopted in *National Audobon*.[139] Several of the court's statements,

132. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

133. The ordinance in question provided for permitted uses and conditional uses. One of the conditional uses requiring a special permit was the filling, drainage or dredging of wetlands. "Wetlands" were defined under the ordinance as "areas where ground water is at or near the surface much of the year or where any segment of plant cover is deemed an aquatic according to N. C. Fassett's 'Manual of Aquatic Plants.'" *Id.*, 201 N.W.2d at 765–66. The ordinance covered all land within 1,000 feet of a lake, pond, or flowage. *Id.* at 764.

134. *Id.*

135. *Id.*, 201 N.W.2d at 768.

136. *Id.* The traditional reach of the public trust in Wisconsin had historically been defined as extending only to the beds underlying navigable waters. Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514, 517 (1952).

137. *Just,* 201 N.W.2d at 771.

138. *Id.* In defining the point at which regulation of private property under the state's police power constitutes a compensable taking, the court stated that "the necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm." *Id.*, 201 N.W.2d at 767.

139. *See supra* notes 126–30 and accompanying text. Washington's Shoreline Management Act also extends protection to contiguous wetlands that lie within two hundred feet of certain of the state's bodies of waters. WASH. REV. CODE § 90.58.030(2)(f) (1985). The *Orion* court, however, held that if the state's regulatory scheme denied Orion all reasonably profitable uses of its property consistent with the public trust, that a taking had occurred. The case was remanded to the trial court for determination of this question. Orion Corp. v. State, 109 Wash. 2d 659–62,

however, depart markedly from the traditional public trust doctrine. The *Just* court focused on extant public rights in preservation of all environmental features in their natural state, not the private owner's rights to the specific land.[140] According to the court, landowners have no absolute right to change the essential natural character of their land and thereby injure these public rights.[141] The court, however, did not offer any historical support for its claim of a preexisting public right in private property. It also declined to acknowledge or discuss the traditional reach of the public trust doctrine. Further, the court did not offer to define a specific range of resources or lands protected by the public interest.[142] While purportedly working within the framework of traditional takings law, the court nevertheless departed from takings analysis by creating an existing public right in the state's natural resources equal, if not superior, to the rights of the private owner of those resources.

3. Orion's *Application of* Just v. Marinette County

Although the *Orion* court left the door open to expansion of the public trust doctrine, it is improbable that the court foresaw the type of expansion advocated by the court in *Just*.[143] First, the *Orion* court specifically recognized the traditional reach of the public trust doctrine and its concomitant concept of a preexisting public right.[144] Second, in discussing possible expansion of the doctrine, the *Orion* court seemed more interested in expanding the scope of the public's pro-

747 P.2d 1082–84 (1987), *cert denied,* 108 S. Ct. 1996 (1988); *see also* Department of Natural Resources v. Thurston County, 92 Wash. 2d 656, 601 P.2d 494 (1979); Department of Ecology v. Pacesetter Constr. Co., 89 Wash. 2d 203, 571 P.2d 196 (1977) (state regulation under Washington's Shoreline Management Act of private property interests in lands of ecological and environmental significance subjected to takings analysis by the court).

140. *Just,* 201 N.W.2d at 768.

141. *Id.*

142. The United States Supreme Court in *Illinois Central* rejected this recognition of a public trust in all of a state's natural resources. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892). The Court recognized a fundamental difference in character between the state's title in lands underlying navigable fresh waters and tide water and the state's title to lands intended for sale, or the United State's title in public lands which are open to preemption and sale. The distinction recognized by the Court is that the state's title in the beds underlying its navigable fresh waters and tide waters is held in trust for the public uses of fishing and navigation. The Court, in drawing such a distinction, declined to recognize a public trust in other state lands.

143. Although the Wisconsin Supreme Court's decision in *Just* was cited by the *Orion* court, Orion Corp. v. State, 109 Wash. 2d 621, 641 n.10, 747 P.2d 1062, 1073 n.10 (1987), *cert. denied,* 108 S. Ct. 1996 (1988), the court's approval of the *Just* holding may be confined to *Just's* extension of the public trust to shorelands lying totally above the water. *See* WASH. REV. CODE § 90.58.030(2)(f) (1985).

144. *Orion,* 109 Wash. 2d at 639, 747 P.2d at 1072.

tected interests than the doctrine's traditionally accepted reach.[145] Third, since its decision in *Orion*, the Washington court had at least one opportunity to expand the traditional reach of the public trust doctrine to protect the public's interest in natural resources outside the state's shorelands and tidelands, but did not choose to do so.[146] It appears, therefore, that the Washington court is at least tentatively committed to the traditional confinement of the public trust to the state's tidelands and shorelands.

III. CONCLUSION

The *Orion* decision marks a watershed in Washington public trust law. After nearly a century of commercial exploitation of Washington's plentiful tidelands and shorelands, the state has asserted its role as trustee for the public in protecting one of its most valuable public resources. Recent steps taken by state and local governments in Washington reflect a strong commitment to preservation of the state's tideland and shoreland resources for the public interest. Increasing public need may seem to justify expansion of the state's public trust interest in the future. In assessing the prospects for further expansion of the public trust's reach, however, constitutional limitations cannot be discounted.

145. *Id.* at 640–41, 747 P.2d at 1073. The court did observe that the doctrine had been expanded beyond its water-based context to be applied to *public lands* that have a special importance for health, welfare, and safety of the public. *Id.* at 641 n.10, 747 P.2d at 1073 n.10. The court did not recognize a similar expansion of the doctrine to *private lands* beyond its water-based context, except to those lands that are contiguous to the water. *Id.* However, it cited with approval the *Just* court's proposition that property owners do not have an absolute right to use their property in a manner for which it is unsuited in its natural state. *Id.* at 659, 747 P.2d at 1083.

146. *See* Allingham v. Seattle, 109 Wash. 2d 947, 749 P.2d 160 (1988). In *Allingham*, the Washington Supreme Court invalidated a city zoning ordinance requiring that a large percentage of certain privately owned lots be retained in or restored to a natural state. *Id.* at 948, 749 P.2d at 161. The ordinance regulated development in 14 designated greenbelt areas, which were primarily linear bands of undeveloped, treed hillsides, about half of which were privately owned. *Id.* at 949, 749 P.2d at 161. The court recognized that the ordinance advanced legitimate public interests in providing buffers between incompatible land uses, mitigating the effects of noise and air pollution, limiting development of environmentally sensitive areas unsuitable for building, maintaining habitat for wildlife, and relieving the monotony of continuous urban development. *Id.* at 952, 749 P.2d at 163. The court, however, did not recognize an extant public right to preservation of these lands in their natural state. Instead, the court found that the ordinance deprived certain landowners of all profitable use of a substantial portion of their land, and therefore constituted a taking without compensation of those portions affected by the ordinance. *Id.* at 952–53, 749 P.2d at 163–64. The public trust doctrine was not at issue in *Allingham*. Despite the fact that the case was decided just two months after *Orion*, the court did not cite *Orion*.

The historical reach of the public trust doctrine as defined in Washington's constitution and by prior case law represents an established boundary between public trust and private property interests. Federal constitutional protections of private property stand at the boundary, limiting the state's power to expand the reach of the public trust. Imposition of a public trust burden, without the support of a preexisting public right, might seriously impair or supplant property interests, exposing the state's action to constitutional challenges.

The United States Supreme Court has recognized significant state discretion in defining the scope and reach of the public trust doctrine within the borders of each state.[147] The Court appears to be committed, however, to adherence to the doctrine's traditional reach within each state. The Court apparently intends such tradition to serve as a predictable model of public rights upon which private property interests and expectations can be established. The Court has also shown a tendency to be protective of private property interests even in the face of strong, countervailing public interests.[148]

Much can be done, however, to shore up the state's public trust interest within its defined reach. Proscribing upland activity harmful to public trust values could reinforce the public's interest by extending to it the same protection accorded private property by the law of nuisance. Such proscription would do nothing to extend the public trust's reach, but would give teeth to public trust rights within their historical reach.

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147. Phillips Petroleum Co.v. Mississippi, 108 S. Ct. 791 (1988).
148. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).